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Where an insolvent firm sold the firm assets to a creditor in consideration of a certain sum in cash, and a further sum, which was recited to be the indebtedness of the firm to the creditor, but which in fact embraced indebtedness of the individual members of the firm, it was held that, in securing a pecuniary benefit beyond that which the law would secure, the transaction was fraudulent and void as to other creditors, and void, not only as to the benefit thus received, but in toto: *Fritchett v. Pollock* (Ala.), 2 Southern Rep. 735.

A similar ruling has been made in Nebraska: *Roop v. Herron*, 17 N. W. 353.

In *Menagh v. Whitwell*, *supra*, it was said that if a *bona fide* sale were made by a retiring partner, in a solvent firm of two members, to his copart-

ner, and the latter assumed the debts, the property formerly of the partnership becomes the separate property of the purchasing partner, and the partnership creditors were not entitled to any preference as against his individual creditors in case of his subsequent insolvency. The case of *Dimon v. Hazard*, 32 N. Y. 65, is cited in favor of the proposition. The case supports the statement; and the cases of *Bullitt v. Charter Fund*, 26 Pa. St. 108; *Howe v. Lawrence*, 9 Cush. 555. Other cases support this position: *Sage v. Chollar*, 21 Barb. 596. See *Cory v. Long*, 2 Sweeny 491; *Goodbar v. Cary*, 16 Fed. Rep. 317; *Crook v. Rindskopf*, 12 N. E. Rep. 174, reversing 34 Hun. 457; *Collomb v. Caldwell*, 16 N. Y. 484.

W. W. THORNTON.

Crawfordsville, Ind.

Supreme Court of Minnesota.

GRIBBLE v. PIONEER PRESS CO.

In an action for a libel, expressed in ordinary language, witnesses should not be allowed to testify as to the meaning which they understood the libel to convey, or that they understood it to apply to the plaintiff an offensive term found in the article.

(*Syllabus by the Court.*)

APPEAL from District Court, Ramsey county.

Plaintiff brought this action to recover for an alleged libel contained in an article published in the issue of defendant's newspaper of October 25, 1884, which, in commenting upon certain libel suits against defendant then pending, stated "that in the great majority of cases libel suits for pecuniary damages are only brought against reputable newspapers by the meanest sort of scallawags, shysters, and adventurers. For the most part they are simply mercenary speculation upon the chance of obtaining a verdict from an ignorant and prejudiced jury by the aid of some crafty lawyer who is usually a partner in the spec-

ulation; that is to say, the lawyer takes the case as a purely business venture, on condition of his being paid half, or some other proportion, of the amount of damages awarded if he should succeed in bamboozling the jury. The Pioneer Press has been pestered with a multitude of such libel suits, of which it has now on hand six or seven, exclusive of Donnelly's mock contribution, almost without exception brought or instigated by notorious sharpers, shysters, confidence men, adventurers, and other disreputable people, as a means of raising the wind, or occasionally as a sham plea in arrest of judgment, preparatory to their fleeing from the country. Mr. Donnelly is more than welcome to all the political advantage he can reap by enrolling himself in this congenial company. His able counsel, Mr. Brisbin, is to be congratulated in having been chosen to represent the common griefs of Mr. Gribble and Mr. Donnelly in the suits of these delectable worthies against the Pioneer Press." Plaintiff had a verdict. From an order granting a new trial plaintiff appeals.

Edwin Gribble, attorney, in person.

W. D. Cornish, for Pioneer Press Co., respondent.

The opinion of the court was delivered by

DICKINSON, J.—The alleged libel upon which this action is brought will be found in the reporter's statement of the case. Upon the trial of the cause the court permitted several witnesses to testify that they, at the time of the publication, understood the article as using the term "shyster" as applicable to the plaintiff. Upon subsequent consideration, the learned judge who tried the cause having come to the conclusion that such evidence was inadmissible, a new trial was for that reason granted, and upon the same question the case is now before us for review.

We are of the opinion that the learned judge was right in his conclusion that the evidence was not admissible: *Van Vechten v. Hopkins*, 5 Johns. 211; *Gibson v. Williams*, 4 Wend. 320; *Wright v. Paige*, *42 N. Y. 581, 583, 584; *Snell v. Snow*, 13 Metc. 278; *White v. Sayward*, 33 Me. 326; *Rangler v. Hummel*, 37 Pa. St. 130; *McCue v. Ferguson*, 73 Pa. St. 333; *Daines v. Hartley*, 3 Exch. 200; and see opinion of WALWORTH, Ch., in *Maynard v. Beardsley*, 7 Wend. 560.

This is in accordance with the principle of the law of evidence, which in general limits the testimony of witnesses to a statement of the facts and circumstances within their knowledge, to the exclusion of their opinions and mental conclusions concerning the very matter in issue. The exceptional grounds upon which such evidence was deemed admissible in *Blakeman v. Blakeman*, 31 Minn. 396, 18 N. W. Rep. 103, in an action for slander, and in some other cases, is a recognition of the applicability to such cases in general of the ordinary rule of evidence. No such exceptional reasons, no necessity, existed in this case for the resort to such testimony to inform the jury as to whether this printed publication was intended to apply the term "shyster" to this plaintiff, and the reasons which in general forbid a resort to such evidence were applicable here. The question to be determined by the jury was, not what interpretation these witnesses had put upon the article when they read it, but what was its meaning. This the jury could determine directly from a reading of the article itself, and by the aid of such other facts and circumstances as might affect the question. Whatever relevant facts, outside of the publication, could have enabled these witnesses to form an intelligent opinion or understanding that the offensive term was intended to be applied to the plaintiff, could have been placed before the jury, and the question in issue should have been determined by the jury from the established *facts* relevant to the issue, and not from the opinions or understanding of witnesses, which may have been based upon very insufficient reasons. It would be a dangerous practice, not in general to be resorted to, to apply in a court of justice for the interpretation of the conduct of the language of men, the understanding, conclusions, opinions of others, which are too often formed under circumstances not conducive to an impartial, mature, and correct judgment. That would be, in some degree, and in some sense, to substitute the irresponsible, hasty opinions of perhaps prejudiced minds, for the calm, deliberate judgment of juries, acting under the sanctions and with the aids which attend their deliberations. In the language of SHAW, C. J., in a similar case (*Snell v. Snow, supra*), to resort to such evidence "would be to make the defendant's liability depend, not on his own malicious intent and purpose in using the language, which might be

quite innocent, and free from blame, but upon the misconceptions or morbid imagination of the person in whose hearing they were spoken."

There were no peculiar circumstances, either as respects the language employed, or the manner of its utterance or publication, to justify a departure from the ordinary rules of evidence. The effect of this testimony was simply to present to the jury the *opinions* of these witnesses as to the meaning of the libel, and that it was intended to apply to the plaintiff the offensive term used in the article. It cannot be said that this testimony was harmless, and cannot have affected the result, unless it is to be also declared that the libelous article bears upon its face, and by necessary legal construction, the meaning and application which is given to it in this testimony. This we cannot declare. We deem that to be a question proper for the consideration of a jury, not necessarily to be determined from the article alone, but from it in connection with such circumstances as may be relevant to the question. As this may come before another jury for determination upon such evidence as shall there be presented, we refrain from commenting upon this feature of the case.

The order granting a new trial is affirmed.

BERRY, J., on account of illness, took no part in this decision.

While the general principle that a witness called to prove a *fact* is to be confined to a statement of that fact to the exclusion of any opinion that he may entertain respecting it, is, undoubtedly, founded, not only on authority, but on reason itself, it, like every other rule of evidence, must present its exceptions.

The case of a person called to testify to (say) a murder that he saw committed differs widely from the case of a person called to prove that certain words of an alleged libelous character have been written concerning any one, for, in the first case, the killing, in and by itself, is, manifestly, a most grievous wrong; but, in the second case, the words used are harmful only in consequence

of the impression they make upon the mind of him that reads them.

In the present case the court holds that "witnesses should not be allowed to testify as to the meaning which they understood the libel to convey, or that they understood it to apply to the plaintiff an offensive term found in the article."

In other words, the witnesses in an action for damages against a newspaper for an alleged libelous publication are to be confined to the single point that they read certain words in a certain newspaper published by the defendant, and, having delivered themselves of this fact, the determination of the meaning of the alleged words, and to whom they were applied, is to be left to the court and jury.

The phrase, "the liberty of the press," is, certainly, very ear-catching, but the analysis of the phrase reveals something less evidently admirable; for, what is the press, divested of the accessories of the many striking names that distinguish the innumerable newspapers that together constitute that powerful abstraction? Simply a number of individual men that write anonymous articles upon every subject, personal and impersonal, that is to be found between the boundaries of Heaven on the one side and those of Hell on the other.

For the most part it must be said, to the honor of the men connected with this mighty abstraction, the press deals fairly in its comments on persons and things, and when it does so its influence is only for good; but, occasionally, when it quits things impersonal to deal with things personal its beneficence is not always quite so manifest.

The change of the rule that the question whether the words written or spoken were to be considered libelous or slanderous was one of law to be determined by the court, to the present general rule that the jury is the judge not only of the fact of publication, but, also, whether the publication is libelous or slanderous, has, undoubtedly, been a great gain to the person assailed. But is this enough protection to that other, and often helpless, abstraction, the public?

Words taken by themselves are simply signs for the eye, or sounds for the ear, and it is only the sense drawn from them by the person under whose notice they come that gives them any value. Words that would seem to one man to be quite harmless would seem to another to be atrocious; wherefore, if the object of the private action of libel be to protect the individual from unwarranted

assaults upon his reputation it seems quite inadequate to confine the witnesses to a simple statement of the form of words used instead of permitting them to supplement their testimony with the impression made upon their intellects, for it is only that impression that works the harm.

To say that the jury can fairly determine the injury done without a knowledge of the impression produced by the words upon the witnesses is to ignore a most important element in the case. When the words are first heard or read by the witnesses, they enter their intellects without any preparation for their reception, and, consequently, their effect must be more startling and profound than when they are preceded by the many preliminaries that lead up to their presentation to the jury. Again, unless the jury fitly represents the average sentiments of the vicinage, it is manifest that it cannot fairly measure the injury done. Perhaps in villages and small towns any twelve men, brought together in the manner ordinarily employed in choosing a jury, would be fair representatives of the neighborhood, and, in such circumstances, probably, substantial justice would be secured by a mere recital of any alleged libelous words. But will the most enthusiastic encomiast of the "jury system" pretend that, in any large city, the average jury represents the average virtue or intelligence of such city?

Unless it does, it is manifest that the impression produced upon it by any form of words is not a just criterion of the impression produced upon the community, and it is only—and especially in such a case as slander or libel—as the jury fairly represents the whole body whence it is drawn that its verdict can do substantial justice.

It may be objected that, if the witnesses are permitted to give their subjective impressions of the meaning intended in any alleged libelous writing, the attention of the jury will be diverted from the fact in issue to the opinions of the witnesses, many of whom may be biased by reason of their relations to the person claiming damages, or unable to judge accurately the importance of the words in question by reason of their being hypersensitive or otherwise wanting in proper powers of discrimination.

While, undoubtedly, the objection has some force, yet, as the plaintiff seeks redress, not for the shape of the letters composing the words that strike the eyes of the readers, or their sound as they strike their ears, but simply for their effect on the understanding of those to whom they are conveyed, it seems nothing extravagant to ask that their effect should be made known to the body upon whom rests the duty of determining what, if any, injury has been done to the plaintiff.

It certainly may be left to the ingenuity of the defendant's counsel and the wisdom of the court to neutralize any extravagance that may appear to characterize the testimony of the witnesses, and thus the possible harm resulting from the views here presented will be reduced to a minimum; while, on the other hand, the cause of justice will be greatly furthered.

If the ascertainment of the meaning of the words, taken by themselves, be alone the proper object of inquiry on the part of the court and jury, then the action of libel is reduced to a question of etymology, and each trial becomes a more or less instructive lesson in which the jury acts as a tribunal for finding the meaning of words of doubtful signification. As it

is conceivable that juries in libel cases may not always agree in their several judgments on the words whose meanings they may be called upon to determine, the merits of this arrangement are not entirely obvious.

Whatever may be thought of the truth or falsity of the hypothesis proposed by Darwin—an author about whose views every one seems to have an opinion, though comparatively few appear to think it necessary to read his works as a preliminary exercise—to account for the existent, history certainly shows an orderly progression, not only of facts, but of ideas, and the development of the law of libel forms no exception to the general rule that things are what they are because of what has preceded them.

It is well known that, down to the time of Charles II, to limit the attention to England, not only was the determination of the question of libel or no libel confined to the court, but the court could, if it saw fit, interpret any alleged libelous words *in mitiori sensu*, and, as a consequence of this power, some of the courts displayed a knowledge of casuistry that would do credit to an expert in moral theology.

Mr. Odger, in his treatise on Slander and Libel, p. *96, *et seq.*, presents some very interesting and instructive specimens of this form of judicial subtlety.

It is manifest that, under such a system, it simply rested with the individual judge sitting in any case to determine whether the defendant should be held responsible for the words used by him concerning the plaintiff, and, as a consequence, the aggrieved plaintiff often obtained the privilege of paying the costs, as a recompense for having been maligned by the defendant. In the case of

Lord Townsend v. Dr. Hughes, 2 Mod. 159 (28 and 29 Car. II), a case of *scandalum magnatum*, the rule was so far altered that the judges were held bound to interpret alleged libelous words in their ordinary sense; but as even this relaxation of the ancient rule failed to produce substantial justice in many instances, the statute of the 32 Geo. III, c. 60, directed that the question of libel or no libel should rest with the jury. Since the enactment of this statute, there has been no important change in the rule, and the present practice, both in England and most of the United States, is as it was then established.

Undoubtedly, the law as it stands to-day, is a vast improvement upon its condition at any past period, but, even so, another step, the one contended for here, which is the logical development of the present state of the law, seems to be necessary in order that a man's reputation be adequately protected from reckless or malicious assaults upon it.

Many cases might be cited in illustration, but, for the sake of brevity, a few must suffice.

In *Daines v. Hartley*, 3 Exch. 200, decided Dec. 5, 1848, which was an action for slander, the objectionable words used by the defendant were, "You (certain traders) must look sharp to get those bills met by them" (the plaintiffs). At the trial before POLLOCK, C. B., a witness testified to having heard the words, and being asked by counsel for the plaintiffs, "What did you understand by that?" the question was objected to and rejected. A verdict having been rendered for the defendant, a rule *nisi* was obtained by plaintiffs upon the ground that the question should have been allowed.

In discharging the rule, POLLOCK, C. B., said that the question was im-

proper because "taken by itself, and without more, the understanding of a person who hears an expression is not the legal mode by which it is to be explained. If words are uttered or printed, the ordinary sense of those words is to be taken to be the meaning of the speaker; but no doubt a foundation may be laid by something else that has occurred; some other matter may be introduced; and then, when that has been done, the witness may be asked, with reference to that other matter, what was the sense in which he understood the words. But the mere question, 'What did you understand with reference to such an expression?' we think is not the correct mode of putting the question." Now, while the above opinion shows a distinct unwillingness on the part of the court to admit the subjective impression of the witness concerning the words in question, it also seems to show a conviction that the withholding of that impression is depriving the jury of a substantial element in the case.

Maynard v. Beardsley, 7 Wend. 560, decided in 1831, and referred to by the court in the case under discussion, was an action of libel against a newspaper for charging Beardsley with official misconduct as U. S. District Attorney, and a witness was asked his understanding of the article containing the alleged libelous words. The question was overruled, and ALLEN, Senator, in concurring with the Chancellor in sustaining the rejection of the question, rests his opinion on the ground that, if the construction of one witness may be given, so may that of another, "which, instead of determining any point of fact, would only tend to a confusion of ideas, embarrassing, instead of informing or enlightening the minds of the jury." Which again seems about equivalent to say-

ing that as contradictory testimony tends to confuse the jury, all such testimony had better be excluded, and each action should consist, not in the evidence of both parties thereto, but only that of one. Possibly, the question as to which one should be permitted to offer his evidence might be settled by pitching a penny before the jury is sworn.

Borchenius v. Nelson, 52 Ill. 236, decided in 1869, was an action of slander, in which Mrs. Nelson, the wife of the defendant, was charged with having said of the plaintiff that he was "a villain, a rascal, and a cheater" in his business. LAWRENCE, J., in delivering the opinion of the Supreme Court, considers the objections to witnesses being permitted to give their understanding of the words, and says: "It may well be asked what better guide (to their meaning) there is than to ascertain how they (the words) were understood by the bystanders. It has been held that, if the words are ambiguous, and the hearers understand them in an actionable sense, it is sufficient, for it is this which caused the damage, and if a foreign language is employed it must appear to have been understood by the hearers." After stating that the jury is not bound by the witnesses' construction of the words, he adds, "it is admissible in evidence, as tending to show what meaning hearers of common understanding would and did ascribe to them."

This opinion is interesting and instructive, not only for the reasoning of the court in the case before it, but for the citations and criticisms of a number of English and American decisions on the subject.

Walker v. Tribune Co., 29 Fed. R. 827 (U. S. C. C., N. Dist. Ill., Feb. 14, 1887, opinion by BLODGETT, J.), shows a conflict between the state and

federal courts in the same locality. This was an action of libel by Walker, a member of the bar and an author, against the *Tribune* for using the following language: "The pamphlet on the Paine Bribery case and the United States Senate, by Albert H. Walker, is plainly the effusion of a crank." In sustaining a demurrer to the declaration, the court held that the word "crank" is not actionable *per se*, as it is not necessarily defamatory, and, also, that it is no libel to underrate an author's talents. In other words, the court holds that, unless any given word is plainly defamatory, the unlucky wight to whom it may be applied is without redress. As such an elegant term as "crank" is susceptible of other than a defamatory construction, it would seem that, under the foregoing decision, it may be applied quite freely.

To the proposition that it is no libel to underrate an author's talents there can be but slight dissent, but, at the same time, it is worth remembering that between literary criticism and literary ruffianism there is a broad distinction.

One more case, and this from Pennsylvania, and the present note will end.

Pittsburgh, A. & M. Ry Co. v. McCurdy, 19 W. N. C. 163, was decided February 7, 1887, by the Supreme Court, in an opinion through CLARK, J.

In the court below, McCurdy brought an action of libel against the railway company, which had discharged him from the position of conductor, for posting up a notice that he "had been discharged for failure to ring up all fares collected."

On the trial of the cause, some witnesses for the plaintiff were asked, under objection and exception by defendant, what was their understand-

ing of the notice. The verdict and judgment were for the plaintiff.

In the opinion, reversing the lower court, the Supreme Court holds that the question should not have been admitted for the reason that, although the notice was not to be taken *in mitiori sensu*, yet, as it was susceptible of an innocent interpretation, viz.: that the conductor was forgetful or careless about using the punch, the company should not be held liable, notwithstanding the impression it may have made upon any of the witnesses. The court rests its opinion largely on the case of *Raugler v. Hummel*, 1 Wr. 130, in which the impressions of witnesses were excluded upon the ground that, if they were admitted, "there would be no use for an *innuendo*. Its office would be supplied by the oath of witnesses, who would draw their inferences from precedent facts instead of the jury. This is not permissible."

The above opinion seems to indicate, in spite of the court's disavowal of the doctrine that words may be taken *in mitiori sensu*, that, whenever the reputation of an individual is attacked, he shall have no redress against his assailant unless he can show that the words do not admit of

any meaning but one that is offensive.

If this be sound law, then, indeed, is the press, and every other engine of possible anonymous verbal abuse, quite safe to send forth the most opprobrious criticism, if only the meaning of the words used is susceptible of being juggled into an innocent sense.

The two cases last noticed seem to show a disposition in the courts to resume their ancient power in cases of libel and slander, and to reserve to themselves the determination of the import of the words upon which such cases are founded. But, notwithstanding this manifestation of judicial anxiety to retain as much of its original power as possible, it can scarcely be doubted that the law of human development, which shows itself so markedly in the constantly increasing importance of the individual, will bring about the general acceptance of the doctrine that, in cases of libel and slander, their very essence consists in the impression made upon the intellects of the persons under whose notice the words in question may have come.

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